United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1902.

No. 1185. 144

ANNIE L. PECK, CALDWELL E. SMITH, ANNA E. FRIAR, ET AL., APPELLANTS,

vs.

HARDY I. HALEY AND ZOE HALEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 27, 1902.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 1, 1902.

In the Court of Appeals of the District of Columbia.

ANNIE L. PECK ET AL., Appellants,
vs.
HARDY I. HALEY ET AL. } No. 1185.

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a Supreme Court of the District of Columbia.

ANNIE L. PECK, CALDWELL E. SMITH, ANNA E. Friar, Belle Lingan Cox, Kate J. Griswold, Hattie A. Billings, Archibald L. Bartlett, Henry B. L. Bartlett, James M. Smith, and McCubbin Bartlett, Adults; Mary M. Alston, William P. Alston, Claude C. Alston, and Jennie G. Alston, Infants, by Their Next Friend, William P. Alston, Complainants,
vs.
HARDY I. HALEY and ZOE HALEY. } No. 19946. Equity.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Amended Bill of Complaint.*

Filed January 13, 1900.

In the Supreme Court of the District of Columbia.

ANNIE L. PECK, CALDWELL E. SMITH, Anna E. Friar, Belle Lingan Cox, Kate J. Griswold, Hattie A. Billings, Archibald L. Bartlett, Henry B. L. Bartlett, James M. Smith, and McCubbin Bartlett, Adults; Mary M. Alston, William P. Alston, Claude C. Alston, and Jennie G. Alston, Infants, by Their Next Friend, William P. Alston, Complainants,
vs.
HARDY I. HALEY and ZOE HALEY.
} In Equity. No. 19946.

To the supreme court of the District of Columbia, holding an equity court for said District:

The above-named complainants, by this their amended bill of complaint against the above-named defendants, respectfully represent unto your honors:

1. That said complainants are citizens of the United States and reside as follows: The said Annie L. Peck, at Owego, in the State of New York; the said Caldwell E. Smith, at Gonzales county, in the State of Texas; the said Anna E. Friar, at De Witt county, in the State of Texas; the said Belle Lingan Cox, at Frio county, in the State of Texas; the said Kate J. Griswold, at New Orleans, in the State of Louisiana; the said Hattie A. Billings, at De Witt
2 county, in the State of Texas; the said James M. Smith, at Lavaco county, in the State of Texas; the said Archibald L. Bartlett and the said Henry B. L. Bartlett, at Harris county, in the State of Texas, and the said McCubbin Bartlett, at Fairfield county, in the State of Connecticut; the said Mary M. Alston, the said William P. Alston, the said Claude C. Alston, and the said Jennie G. Alston, with their father, William P. Alston, at De Witt county, in the State of Texas; that the four complainants last mentioned are infants under the age of twenty-one years and sue in respect of their rights in the premises by the said William P. Alston as their next friend; that all of the other complainants are adults and sue in their own right.

2. That the said defendants are citizens of the United States and reside at Montgomery county, in the State of Maryland.

3. That in the year 1876 a certain Ann Bartlett died intestate at Owego, in the State of New York; that the said Ann Bartlett, who was a daughter of James M. Lingan, of the District of Columbia, first married Elias B. Caldwell, and after the death of the said Elias married John L. Bartlett; that the only children of the said Ann by

her said first marriage were Hannah O. Caldwell and Susan L. Caldwell, both of whom died unmarried in the lifetime of their mother, and Mary C. Smith, who had married and who also died in the lifetime of her mother, and whose husband is also now dead; that the only children of the said Ann by her said second marriage were Annie L. Peck, James L. Bartlett, and John L. Bartlett, the younger,
of whom the said John L. Bartlett, the younger, died un-
3 married in the lifetime of his mother.

That the said Mary C. Smith, child of the said first marriage, left her surviving children and heirs-at-law as follows, viz., James M. Smith, Caldwell E. Smith, Anna E. Friar, and Belle Lingan Cox, who are complainants herein, and Mary Smith Alston, who died intestate, leaving a husband, William P. Alston, and children of their marriage and sole heirs-at-law as follows, Hattie A. Billings, Mary M. Alston, William P. Alston, the younger, Claude C. Alston and John G. Alston, who are complainants herein, and that the said William P. Alston, the surviving husband of the said Mary Smith Alston, by deed dated and duly recorded, did convey to his said children all his interest in real estate belonging to or to which the said Ann Bartlett was in any manner entitled at the time of her death.

That the said Annie L. Peck, child of the said second marriage of her, the said Ann Bartlett, is party complainant herein; that the said James L. Bartlett survived his wife and is dead, intestate, leaving as his sole heirs-at-law his children, Kate J. Griswold, Archibald L. Bartlett, Henry B. L. Bartlett, and McCubbin Bartlett, who are complainants herein, and that by reason of the premises the said complainants are at the present time the sole heirs-at-law and legal representatives of the said Ann Bartlett, and in them respectively is vested in certain proportions of interest by descent, as aforesaid, all the estate, legal and equitable, of the said Ann Bartlett, at the time of her death, in certain real estate in the District of Columbia, hereinafter described and mentioned.

4 4. That a certain William A. Bradley, as the trustee of Thomas Mitchell, by deed dated November 8th, 1828, and on the same day duly recorded in Liber W. B. No. 23, at folios 403 *et seq.*, one of the land records of the said District, did convey to the said Ann Bartlett, who was then the wife of the said John L. Bartlett, and to her heirs and assigns and to and for her and their only use and behoof forever a certain parcel of land in the said District, and being parts of two tracts called Long Meadows and Chance, described as follows—that is to say:

Beginning at the southwest corner of a tract of land conveyed by John McLeod to Elias B. Caldwell, and running thence south fourteen degrees thirty minutes west twenty-three and one-half perches; thence south twenty-five degrees east thirty-eight perches to a stone, D 1; thence south twenty-four degrees twenty-eight minutes east one hundred and forty-one and one-half perches to a stone, D 2; thence north two degrees thirty minutes west thirty perches to the beginning of Chance; thence north thirty-three degrees thirty

minutes west thirty-two and three-tenths perches; thence to the beginning, containing forty-six acres, more or less.

That it is stated in said deed, and complainants aver the fact to be, that at a sale at public auction of the said parcel of land by the said Bradley the said Ann Bartlett was the highest bidder and became the purchaser of the same for the sum of twenty-four hundred and fifty dollars, and that she had secured the payment of the said purchase-money to the satisfaction of the said Bradley and became thereby entitled to the deed aforesaid.

Complainants crave leave to refer to and read as a part of this amended bill the certified copy of the said deed, which was
5 filed with the original bill, marked Exhibit A.

9. That by deed dated said November 8, 1828, and duly recorded on November 10, 1828, in said Liber W. B. No. 23, at folios 407 *et seq.*, the said Ann Bartlett and her husband, the said John L. Bartlett, conveyed the said parcel of land to Roger C. Weightman and John H. Riely and the survivor of them and the heirs and assigns of such survivor upon certain trusts in the said deed declared; that it is stated in said deed, and complainants aver the fact to be, that on November 4, 1828, George W. P. Custis made and delivered to the said John L. Bartlett the promissory note of him, the said Curtis, of that date for the sum of twelve hundred dollars, payable in six months to the order of him, the said John L. Bartlett; that the said John L. Bartlett endorsed the said note, and that the said note was about to be discounted at the Bank of Washington and the proceeds applied "to the payment of the residue of the purchase-money" for the said parcel of land purchased by the said Ann Bartlett from the said Bradley, as aforesaid, and that in order to secure the payment of the said note to the said Bank of Washington the said conveyance in trust was executed; that the trusts declared in said deed provided for a sale of the said parcel of land at public auction after thirty days' previous public notice in some newspaper published in the city of Washington in case of default made by the said George W. P. Curtis in the payment of his said promissory note and for the payment of the costs and expenses of such sale and of the said debt out of the proceeds of such sale, and the payment of the surplus, if any, to the said Ann Bartlett, her executors, ad-
6 ministrators, and assigns.

Complainants crave leave to refer to and read as a part of this amended bill the certified copy of said deed of conveyance in trust, which was filed with the original bill, marked Exhibit B.

6. Complainants believe and aver that the said note was duly discounted by the said bank; that the proceeds thereof were duly applied to the payment of the residue of the said purchase-money of twenty-four hundred and fifty dollars, and that thereby the whole of the said purchase-money was paid and discharged, and that the debt to the said bank created by the said discount was satisfied and discharged by the said Curtis, and that thereupon and thereafter it became and was the duty of the said trustees and of the survivor of them to reconvey the said parcel of land to the said Ann Bartlett,

notwithstanding the said deed of conveyance in trust of the same did not in terms provide for such reconveyance; that such reconveyance was not made to the said Ann Bartlett during her lifetime, nor has it been made to her heirs or legal representatives since her death, but, in fact, the said Weightman, who survived the said Riley and in whom the legal title to said parcel of land became vested by reason of such survivorship, did, as more particularly hereinafter set forth, improvidently and in violation of his duty in the premises as such trustee, execute and deliver a deed of conveyance, bearing date November 3, 1869, of the said parcel of land to the father of the defendants by way of a release of the said deed of trust, and did thereby transfer to and invest with such legal title one not holding in privity of estate with the said Ann Bartlett
7 or her heirs, to the great detriment of the said Ann and her said heirs in the premises.

7. That prior to July 1, 1830, issue had been born alive of the marriage of the said John L. and Ann Bartlett, whereby the said John L. Bartlett became seized of an estate by the courtesy in the said parcel of land, and that on the said July 1, 1830, the said John L. Bartlett and a certain Robert Isherwood entered into a contract under the seals of the parties, wherein the said John L. Bartlett agreed, in consideration of the sum of fifteen hundred and fifty dollars, of which three hundred and fifty dollars *was* to be paid by said Isherwood to the said Bartlett upon the execution of said contract, and twelve hundred dollars to be paid on or before November 1, 1830, that he, said John L. Bartlett, should, on or before the said last-mentioned day, "by a good and sufficient deed or instrument of writing to be by him, the said John L. Bartlett, at his cost and charge, duly made and executed according to law, grant, convey, and confirm unto him, the said Robert Isherwood, his heirs and assigns, all that parcel of land" aforesaid, and the said Isherwood on his part agreed to pay the residue of twelve hundred dollars of the said purchase-money of fifteen hundred and fifty dollars to the said Bartlett upon the execution of such deed, and that in and by said contract it was further agreed between the parties that the said Isherwood, his heirs or assigns, might "enter in and upon the said parcel of land and premises on or before the said first day of November" and "take and receive the rents, issues, and profits thereof to his and their own use and benefit from this first day of July," and that the said John L. Bart-
8 lett thereupon and pursuant to said contract did deliver the possession of the said parcel of land to the said Isherwood, and that the said Isherwood did thereupon enter upon the same, and that the said Isherwood died on June 1, 1849, testate and in the possession of said land under said contract, leaving him surviving a widow, Martha Isherwood, and three children of their marriage, who were his sole heirs-at-law, viz., Frances Ann, who intermarried with George W. Dawson; Margaret E., who intermarried with Alfred G. Haley, and Robert J. Isherwood, and who succeeded to such rights as the said Robert Isherwood at the time of his death had

in the said parcel of land, and that they took possession of the same. Complainants file herewith a corrected copy of the said contract, marked Exhibit C, which they crave leave to read and refer to as a part of this amended bill.

That the last will and testament of the said Robert Isherwood is dated December 15, 1847, was probated in the orphans' court of said District on June 19, 1849, and is recorded in Liber No. 6 of Wills, at folio 212 *et seq.*, of the records of the office of the register of wills of said District.

That said testator in and by his said last will and testament devised in general terms, and not by particular description thereof, all his estate to his wife for life, and after her death devised the same to his said three children equally, share and share alike.

That the said John L. Bartlett survived the said Robert Isherwood for thirty-five years, and died on May 24, 1884, never having complied with his undertaking to convey the said parcel of land
9 in fee-simple to said Isherwood by a good and sufficient deed; that the only interest or estate lawfully acquired and held by the said Robert Isherwood in the said parcel of land during his lifetime and at the time of his death was the right to the possession and to the rents, issues, and profits thereof during the life of him, the said John L. Bartlett, under the contract of sale aforesaid between him, the said Robert Isherwood, and him, the said John L. Bartlett, nor did the said devisees and heirs-at-law of him, the said Robert Isherwood, ever lawfully have or acquire any other or greater estate therein.

9. That the said Martha Isherwood, the widow of said testator, by deed dated April 11, 1866, and recorded among the land records of said District, did relinquish and convey to the said three children of said Robert Isherwood all her interest in his lands, and that said three children, by deed dated May 24, 1866, and recorded among said land records, did convey to John H. McCutcheon all their interest in the said Robert Isherwood's real estate, in trust for certain purposes as to part thereof located in the city of Washington, in said District, and in trust as to the residue thereof; that such residue be reconveyed to the said Alfred G. Haley in trust for the creation of a fund for the benefit of the said three children of the said Robert Isherwood; that such residue was conveyed by the said McCutcheon to the said Haley upon such trusts by deed dated June 5, 1866, and recorded among said land records, and that said Haley, by deed dated June 1, 1870, and recorded among said land records, did convey said residue to Moses Kelly, and that said Kelly, by deed dated April 26, 1875, and recorded among said land records, did
10 convey the same to Edward Clark, S. H. Kaufmann, and Lewis Clephane, who caused a subdivision of the parcel of land referred to in said contract of sale to be recorded in the office of the surveyor of the District of Columbia on the — day of ——, in Liber —, at folio —; that among the lots of ground in said subdivision are certain ones described as follows, viz: ten (10), eleven (11), twelve (12), thirteen (13), twenty-three (23), and twenty-

strengthen the position of the said devisees and heirs of the said Isherwood and of said Haley in case of any attempt on the part of the said Ann Bartlett or her descendants to recover the same, did craftily and in derogation of the rights of her, the said Ann Bartlett, in the premises, induce and persuade the said Roger C. Weightman, who was the survivor of the said Riely, and who was then quite old, and who by reason of his advanced age was of feeble mind and body, to execute and deliver to the said Haley a deed bearing date November 3, 1869, and on the same day recorded in Liber T. and R. 18, at folio 400, of said land records, wherein and whereby the legal title in fee to said land invested in him, the said Weightman, as surviving trustee under the said hereinbefore-mentioned deed of conveyance in trust, dated November 28, 1828, from the said John L. and Ann Bartlett to the said Weightman and the said Riely, was transferred to and vested in the said Haley, and is now by descent vested in his two children and sole heirs-at-law, viz: Hardy I. Haley and Zoe Haley, who are defendants hereto. Complainants crave leave to refer to and read as a part of this amended bill the copy of said deed filed with the original bill, marked Exhibit D.

11. That in the year 1882 the said Haley died intestate, and that the said John L. Bartlett survived him by two years and died at Hammerton, in the State of New Jersey, on the 24th day of May, 1884.

13 That the said defendants upon the death of their father, the said Alfred G. Haley, entered into possession of the said tract of land and still held the possession of the certain subdivision lots aforesaid, part of the same, and wrongfully refuse to deliver the possession of the same to the complainants, notwithstanding the only estate which they lawfully held in the same was terminated by the death of him, the said John L. Barr-ett, and a right of entry thereon accrued to the complainants by such death.

12. That the said John L. Bartlett and Ann Bartlett, his wife, after removing from the said district as aforesaid, remained in said State of Connecticut until the year 1860, when they moved to Owego, in the State of New York, and that between the time of their removal from the said district and the said death of the said Ann Bartlett, in 1876, the said John L. Bartlett was absent from his home for long periods of time, and visited the same infrequently; that he had no permanent employment and travelled from place to place, and that after the death of his said wife he went away and thereafter, during his lifetime, his whereabouts were unknown to the children or descendants of the said Ann Bartlett; that in the meantime, by reason of marriages, half-blood relationship, deaths of parents, infancy, and other causes, the descendants of the said Ann Bartlett had become widely separated and were living at various places in the said United States, remote from each other, and the whereabouts of but few of them known to the others; that

14 two children only of the said John L. and Ann Bartlett, viz., the said Annie L. Peck and James L. Bartlett, survived their father, and that the said James L. Bartlett sur-

strengthen the position of the said devisees and heirs of the said Isherwood and of said Haley in case of any attempt on the part of the said Ann Bartlett or her descendants to recover the same, did craftily and in derogation of the rights of her, the said Ann Bartlett, in the premises, induce and persuade the said Roger C. Weightman, who was the survivor of the said Riely, and who was then quite old, and who by reason of his advanced age was of feeble mind and body, to execute and deliver to the said Haley a deed bearing date November 3, 1869, and on the same day recorded in Liber T. and R. 18, at folio 400, of said land records, wherein and whereby the legal title in fee to said land invested in him, the said Weightman, as surviving trustee under the said hereinbefore-mentioned deed of conveyance in trust, dated November 28, 1828, from the said John L. and Ann Bartlett to the said Weightman and the said Riely, was transferred to and vested in the said Haley, and is now by descent vested in his two children and sole heirs-at-law, viz: Hardy I. Haley and Zoe Haley, who are defendants hereto. Complainants crave leave to refer to and read as a part of this amended bill the copy of said deed filed with the original bill, marked Exhibit D.

11. That in the year 1882 the said Haley died intestate, and that the said John L. Bartlett survived him by two years and died at Hammerton, in the State of New Jersey, on the 24th day of May, 1884.

13 That the said defendants upon the death of their father, the said Alfred G. Haley, entered into possession of the said tract of land and still held the possession of the certain subdivision lots aforesaid, part of the same, and wrongfully refuse to deliver the possession of the same to the complainants, notwithstanding the only estate which they lawfully held in the same was terminated by the death of him, the said John L. Barr-ett, and a right of entry thereon accrued to the complainants by such death.

12. That the said John L. Bartlett and Ann Bartlett, his wife, after removing from the said district as aforesaid, remained in said State of Connecticut until the year 1860, when they moved to Owego, in the State of New York, and that between the time of their removal from the said district and the said death of the said Ann Bartlett, in 1876, the said John L. Bartlett was absent from his home for long periods of time, and visited the same infrequently; that he had no permanent employment and travelled from place to place, and that after the death of his said wife he went away and thereafter, during his lifetime, his whereabouts were unknown to the children or descendants of the said Ann Bartlett; that in the meantime, by reason of marriages, half-blood relationship, deaths of parents, infancy, and other causes, the descendants of the said Ann Bartlett had become widely separated and were living at various places in the said United States, remote from each other, and the whereabouts of but few of them known to the others; that

14 two children only of the said John L. and Ann Bartlett, viz., the said Annie L. Peck and James L. Bartlett, survived their father, and that the said James L. Bartlett sur-

vived him for about one year; that the said Annie L. Peck learned of the death of her father about one week after it took place, but the remaining descendants of the said Ann Bartlett did not learn of the same for several years thereafter, and as to those of them residing in Texas not until the year 1891, and that since learning of their rights in the premises the complainants have been diligent in their efforts through counsel learned in the law and agents and trustees to enforce the same.

That prior to the said year 1891 Ezra J. Peck, the husband of the said Annie L. Peck, at her instance, was endeavoring, through correspondence and inquiry by mail, to ascertain the whereabouts of the other descendants of the said Ann L. Bartlett, and to obtain united action, on their part, in an effort to recover the real estate aforesaid, and that it was not until the said year 1891 communication was finally had between all the parties in interest, and such action became possible, and that thereupon counsel was employed for said purpose.

That under the advice of such counsel certain deeds of conveyance were executed and delivered by complainants to said Ezra J. Peck and Leo Simmons and their heirs, whereby the title of the descendants of the said Ann Bartlett to said real estate was conveyed to the said Peck and Simmons, in trust, among other things, to institute and prosecute such suits and actions as might be necessary to recover said real estate, and to sell and dispose of the same for the benefit of said descendants; that one of said deeds is
15 dated October 20th, 1891, and the other June 20th, 1892, and that said deeds were recorded on October, 1892, in Liber —, at folio — *et seq.*, of the land records of said District; that in the said month of October, 1892, the said Peck and Simmons, as such trustees, instituted a suit in ejectment in the supreme court of said District to recover the said subdivision lots Nos. 10, 11, 12, 13, 23, and 24, in said block or square 10, and instituted another suit in ejectment against Christian Heurich, who held under said Haley, to recover other portions of said real estate; that upon the trial of the case last mentioned the court held the said last-mentioned deeds to be invalid and void and to pass no title, and there was verdict and judgment for said defendant; that this ruling upon appeal was affirmed by the Court of Appeals of said District and by the Supreme Court of the United States for reasons which will appear in the opinions of the said courts respectively, which are reported in 6 App. D. C., p. 273, and 167 U. S., p. 624.

13. That until they were informed by their counsel of the fact in 1894 none of the descendants of the said Ann Bartlett had knowledge of the said deed from said Weightman, surviving trustee, to the said Haley, and they believe, and so believing aver, that the said Ann Bartlett was ignorant of the same in her lifetime; that said counsel gave it as their opinion, based upon the decisions of the Supreme Court of the United States in Doe *v.* Consendine, 6 Wall., p. —, and Young *vs.* Bradley, 101 U. S., p. —, that by the payment of the debt secured the title of the said Weightman and

Riley under the said deed of trust became extinct, and that
16 the legal title in said land revested in the said Ann Bartlett, and that the said deed from the said Weightman, as surviving trustee, to said Haley would be no bar to the maintenance of ejectment by the descendants of the said Ann Bartlett; that complainants, however, are now advised by said counsel that upon further consideration of the premises and upon consultation with other counsel who have also been recently employed by and on behalf of complainants that they are of the opinion that the said deed of trust to Weightman and Riley falls within the class of instruments adverted to in the opinion of the said Supreme Court of the said United States in the case of Lincoln *vs.* French, 105 U. S., p. —, and not within the class to which those belonged, which were considered by said court in the first-mentioned cases, and that under the decision in Lincoln *vs.* French the legal title to said land continued in said trustees and in the survivor of them until it passed by the deed from the survivor of them, said Weightman, to said Haley; that it was in said Haley at the time of his death and upon his death passed to the said defendants, Hardy I. Haley and Zoe Haley.

And forasmuch as complainants cannot bring their action of ejectment against the said defendants for the recovery of the said above specifically enumerated lots because the naked legal title thereto is outstanding in the said defendants, under the circumstances above stated, and forasmuch as complainants have no remedy in the premises, save in this honorable court, they pray:

17 *Prayers.*

1. That the said defendants be required to answer this bill of complaint, oath to said answers being hereby expressly waived.

2. And to that end that complainants have process against the said defendants.

3. That a decree may be passed in respect of the title and estate in said subdivision lots, acquired by said Haley under the said deed to him from the said Weightman, as surviving trustee, and held by him, said Haley, at the time of his death, and now vested in the said defendants, declaring that the same be held by said defendants in trust for the complainants.

4. That complainants be permitted by said decree to bring and prosecute their action of ejectment on the law side of this court against the said defendants for the recovery of the said subdivision lots, and that the defendants be enjoined and restrained by said decree from setting up in their defence in such action the deed aforesaid from said Weightman to said Haley, or that issues to try the question of title to said lots may be framed and sent by this court to the law court under the same restrictions.

5. That this amended bill of complaint be retained by the court until such action of ejectment or such issues be tried and determined, and, if the complainants prevail therein, that the court by

its other and further decree require the defendant to convey and release the said title and estate held in trust to the complainants.

18 6. That for the purposes aforesaid all necessary steps and proceedings may be taken and had under the direction of this court.

7. That the complainants may have all such other and further relief as the nature of their case may require and to the court shall seem just and proper.

A. A. BIRNEY,
LEO SIMMONS, AND
HUGH T. TAGGART,
Solicitors for Complainants.

19 EXHIBIT "A."

Filed November 20, 1898.

Liber W. B. No. 23, folio 403 *et seq.*

William A. Bradley, trustee, to Ann Bartlett. } Deed. Recorded 8 November, 1828.

This indenture made this eighth day of November in the year of our Lord one thousand eight hundred and twenty-eight between William A. Bradley of the city of Washington in the District of Columbia of the one part and Ann Bartlett of the city and District aforesaid of the other part. Whereas by a deed of trust bearing date on the nineteenth day of March in the year of our Lord one thousand eight hundred and twenty-one and made between Thomas Mitchell late of the State of South Carolina of the one part and the said William A. Bradley of the other part for the consideration in said deed of trust expressed he the said Thomas Mitchell did convey to the said William A. Bradley his heirs and assigns a certain piece or parcel of land situate lying and being in the county of Washington in the District of Columbia and in said deed of trust particularly described by metes and bounds.

To have and to hold the said piece or parcel of land and premises with the appurtenances thereunto belonging or in anywise appertaining to him the said William A. Bradley his heirs and assigns forever *In trust nevertheless* and to and for the uses intents and purposes in the said deed of trust mentioned and in further trust and with authority to the said William A. Bradley upon the happening of certain contingencies in said deed of trust mentioned to sell and dispose of the property therein con-

20 veyed and all the interest of the said Thomas Mitchell in the same whether in law or equity in such manner and upon such terms as in said deed of trust mentioned and to make a good and sufficient deed of conveyance of all the right, title and interest of the said Thomas Mitchell his heirs, executors and administrators of in and to the property so as aforesaid authorized to be sold to the purchaser or purchasers thereof as in and by the above-mentioned deed

of trust duly executed and recorded in Liber W. B. No. 2 folios 408, 409, 410 & 411 one of the land records of Washington county, relation being thereto had more fully may appear. *And whereas* the said William A. Bradley in order to carry into execution the purposes of the said trust and in pursuance of the authority so to him given and the requisites in said deed of trust having been complied with on the first day of September in the year of our Lord one thousand eight hundred and twenty-six did set up at public auction the said piece or parcel of land whereupon the said Ann Bartlett became the highest bidder and purchaser at and for the sum of two thousand four hundred & fifty dollars and the said Ann Bartlett having secured the payment of the said sum of money to the approbation of the said William A. Bradley and being therefore entitled to a conveyance of the said piece or parcel of land. *Now this indenture witnesseth* that the said William A. Bradley for and in consideration of the premises and for the further consideration of the sum of one dollar to him in hand paid by the said Ann Bartlett before the sealing and delivery of these presents the receipt whereof is hereby acknowledged, hath given, granted bargained sold aliened enfeoffed and confirmed and by these presents doth give grant bargain sell alien enfeoff and confirm unto the said Ann Bartlett her heirs
21 and assigns all and singular that certain piece or parcel of land situate lying and being in the county of Washington in the District of Columbia being part of two tracts called "Long Meadows" and "Chance" beginning at the southwest corner of a tract of land conveyed by John McLeod to Elias B. Caldwell and running thence south fourteen degrees thirty minutes west twenty-three and a half perches, thence south twenty-five degrees east thirty-eight perches to a stone, D 1. Thence south seventy-four degrees twenty-eight minutes east one hundred and forty-one and a half perches to stone D 2. Thence north two degrees thirty minutes west thirty perches to the beginning of "Chance" thence north thirty-three degrees thirty minutes west thirty-two and three-tenths perches thence to the beginning containing forty-six acres more or less *together* Together with all and singular the buildings, improvements, privileges and appurtenances thereunto belonging, or in anywise appertaining, and all the right, title, and interest of the said Thomas Mitchell his heirs executors or administrators whether in law or in equity, of in and to the same *To have and to hold* the above-described piece or parcel of land and premises hereby conveyed or intended so to be together with all and singular the buildings, improvements, privileges and appurtenances thereunto belonging or in anywise appertaining to the said Ann Bartlett her heirs and assigns forever, and to and for her and their only proper use and behoof forever.

In witness whereof the said William A. Bradley hath here-
22 unto set his hand and seal the day and year first hereinbefore written.

W. A. BRADLEY, [SEAL.]
Trustee of Th. Mitchell.

Signed, sealed and delivered in presence of—
WM. S. DRUMMOND.

DISTRICT OF COLUMBIA, } *sct:*
Washington County, }

Be it remembered that on this eighth day of November, in the year of our Lord one thousand and eight hundred and twenty-eight, personally appears before the subscriber, assistant judge of the circuit court of the United States for the District of Columbia, William A. Bradley, party grantor in the within deed mentioned, and acknowledges the within deed or instrument of writing to be his act and deed, and that he executed the same for the uses, intents, and purposes therein mentioned.

Acknowledged before—

B. THURSTON.

Endorsed.

This is to certify that the within is a true and verified copy of an instrument as recorded in Liber W. B. No. 23, fol. 403 *et seq.*, one of the land records of the District of Columbia.

Office of the recorder of deeds, Washington, D. C., October 20, 1893.

GEO. F. SCHAYER,
Dep. Recorder of Deeds.

(Stamp.)

23 EXHIBIT B.

Filed November 20, 1899.

Liber W. B. No. 23, folio 408 *et seq.*

John L. & Ann Bartlett
to
Roger C. Weightman & John H. Riely. } Deed of trust. Recorded 10th November, 1828.

This indenture made this 8th day of November in the year of our Lord one thousand eight hundred and twenty-eight between John L. Bartlett of the city of Washington in the District of Columbia and Ann Bartlett his wife of the one part and Roger C. Weightman and John H. Riely of the said city of the other part, Whereas a note for the sum of twelve hundred dollars and dated the 4th day of November in the year of our Lord one thousand eight hundred and twenty-eight drawn by George W. P. Curtis and endorsed by the said John L. Bartlett at six months after date is about to be discounted in the Bank of Washington, the proceeds of which it is intended shall be applied to the payment of the residue of the purchase-money for a piece of land purchased by the said Ann Bartlett from William A. Bradley, trustee of Thomas Mitchell. *And whereas* the said John L. Bartlett and Ann his wife are desirous of securing the payment of the said note to the said Bank of Washington and the renewals thereof. *Now this indenture witnesseth* that the said John L. Bartlett and Ann Bartlett his wife for and in consideration of the premises and for the further consideration of the sum of one dollar to them in hand paid by the said Roger C. Weightman and John H. Riely

before the sealing and delivery of these presents the receipt whereof is hereby acknowledged have given, granted bargained sold
24 aliened, enfeoffed and confirmed and by these presents do give grant bargain sell alien enfeoff and confirm unto the said Roger C. Weightman and John H. Reily and the survivor of them and the heirs and assigns of such survivor all and singular that piece or parcel of land situate lying and being in the county of Washington in the District of Columbia being part of two tracts of land called "Long Meadows" and "Chance" beginning at the southwest corner of a tract of land conveyed by John McLeod to Elias B. Caldwell and running thence south fourteen degrees thirty minutes west twenty-three and a half perches thence south twenty-five — east thirty-eight perches to stone D 1, thence south seventy-four degrees twenty-eight minutes east one hundred and forty-one and a half perches to stone D 2, thence north two degrees thirty minutes west thirty perches to the beginning of "Chance" thence north thirty-three degrees thirty minutes west $32\frac{3}{10}$ perches, thence to the beginning containing forty-six acres more or less together with all and singular the buildings, improvements, privileges and appurtenances thereunto belonging or in anywise appertaining and all the estate right title and interest of them the said John L. Bartlett and Ann his wife of in and to the same *To have and to hold* the said piece or parcel of land and premises with the appurtenances thereof unto the said Roger C. Weightman and John H. Riely and the survivor of them and the heirs and assigns of such survivor forever, in trust nevertheless and to and for the following uses intents and purposes that is to say in trust that in case the said George W. P. Curtis shall fail, to pay said note or any other note or notes which may be at any time or
25 times hereafter given in lieu or by way of renewal of the same or of any part of the amount thereof, that then the said Roger C. Weightman and John H. Reily or the survivor of them or his heirs shall sell and dispose of the said piece or parcel of land and premises with the appurtenances at public auction for cash or credit as they or he may deem best first giving thirty days' notice of such sale by advertisement inserted at least five times within the thirty days in some newspaper published in said city and out of the proceeds thereby arising pay in the first place all expenses of such advertising and sale, secondly pay off and discharge the said debt, with all interest, costs and charges thereon the surplus if any to be paid over to the said Ann Bartlett her executors administrators or assigns.

In witness whereof the said John L. Bartlett and Ann Bartlett have hereunto set their hands and seals the day and year first hereinabove written.

JOHN L. BARTLETT. [SEAL.]
ANN BARTLETT. [SEAL.]

Signed, sealed and delivered in presence of—
C. H. W. WHARTON.
D. A. HALL.

DISTRICT OF COLUMBIA, } ss:
Washington County, }

Be it remembered that on this 8th day of November, in the year of our Lord one thousand eight hundred and twenty-eight, personally appears John L. Bartlett, a party grantor in the within deed or instrument of writing mentioned, before us, two justices of the
26 peace for the county and District aforesaid, and acknowledges the within deed or instrument of writing to be his act and deed and the piece or parcel of ground and premises therein mentioned to be the right and estate of the said Roger C. Weightman and John H. Reily and the survivor of them, his heirs and assigns forever, according to purpose, true intent, and meaning of the said deed or instrument of writing; and now also at the same time personally appears Ann Bartlett, wife of the said John L. Bartlett, before us, the subscriber-, two justices of the peace in and — the said county, and acknowledges the foregoing deed or instrument of writing to be her act and deed and the piece or parcel of land and premises, with the appurtenances, therein mentioned to be the right and estate of the said Roger C. Weightman and John H. Reily and the survivor of them, his heirs and assigns forever, according to the purpose, true intent, and meaning of the said deed or instrument of writing; and the said Ann Bartlett, being by us privately examined apart from and out of the hearing of her husband "whether she doth make her acknowledgment of the same willingly and freely and without being induced thereto by fear or threats of or ill usage by her husband or fear of his displeasure," acknowledges that she doth make her acknowledgment of the same willingly and freely and without being induced thereto by fear or threats of or ill usage by her husband or fear of his displeasure.

Acknowledged before—

C. H. W. WHARTON.
D. A. HALL.

27 Endorsed.

This is to certify that the within is a true and verified copy of an instrument as recorded in Liber W. B. No. 23, fol. 408 *et seq.*, one of the land records of the District of Columbia.

Office of the recorder of deeds, Washington, D. C., October 20, 1893.

GEO. F. SCHAYER,
Dep. Recorder of Deeds.

(Stamp.)

28 EXHIBIT C.

Filed January 13, 1900.

"Articles of agreement made and concluded this first day of July in the year of our Lord one thousand eight hundred and thirty between John L. Bartlett of the one part and Robert Isherwood of the other part as follows:

First the said John L. Bartlett in consideration of the sum of fifteen hundred and fifty dollars lawful money of the United States to be paid as is hereinafter mentioned and agreed doth covenant and agree with the said Robert Isherwood that he the said John L. Bartlett shall on or before the first day of November next ensuing, by a good and sufficient deed or instrument of writing to be by him the said J. L. Bartlett at his cost and charge duly made and executed according to law, grant, convey and confirm unto him the said R. Isherwood his heirs and assigns all that parcel of land situated lying and being in the county of Washington in the District of Columbia being part of two tracts of land called 'Long Meadows' and 'Chance' containing forty-six acres more or less together with all and singular the buildings, improvements, privileges and appurtenances thereunto belonging or in anywise appertaining. And the said R. Isherwood for himself, his heirs, executors, and administrators doth covenant, promise and grant to and with the said Bartlett his heirs and assigns that he the said R. Isherwood shall and will on executing the said deed pay or cause to be paid to the said Bartlett his heirs or assigns, in addition to the sum of three hundred and fifty dollars in hand paid at or before the sealing and delivery of these presents the sum of twelve hundred dollars
29 as and for the purchase-money for the said parcel of land and premises above mentioned.

And it is further agreed by and between the said parties to these presents that the said R. Isherwood his heirs and assigns shall and may on or before the first day of November next, enter into and upon the said parcel of land and premises above mentioned and shall take and receive the rents, issues and profits thereof to him and their own use and benefit from this first day of July.

In testimony whereof they have hereunto interchangeably set their hands and seals the day and year above written.

JOHN L. BARTLETT. [SEAL.]
ROBERT ISHERWOOD. [SEAL.]

Signed, sealed and delivered in the presence of—
GEORGE WATTERSON.
MOSES POOR."

Endorsement: John L. Bartlett, Robert Isherwood.

30 *Demurrer to Amended Bill.*

Filed June 18, 1900.

In the Supreme Court of the District of Columbia.

ANNIE L. PECK ET AL.
vs.
HARDY I. HALEY ET AL. and ZOE HALEY. } Equity. No. 19946.

Now come the defendants Hardy I. Haley and Zoe Haley, and by protestation, not confessing any of the matters alleged in the amended

bill of complaint to be true as charged, demur to the said amended bill and say that they ought not to be required to answer the same, because they say that the said complainants have not in and by their said amended bill stated such a case as entitles them to any relief in a court of equity, in that:

1. Because of complainants' laches, apparent upon the face of said amended bill.

2. Because it appears from said amended bill that the statute of limitations has barred any right which complainants may have had.

3. Because if complainants have any rights in the property described in said amended bill of complaint their remedy is at law and not in equity.

4. Because the amended bill of complaint shows that any title which complainants may have had had been by them conveyed to persons not made parties to this suit before the institution thereof, leaving the title in said third parties.

31 5. Because the various prayers for relief sought by said amended bill are inconsistent with each other.

6. For numerous other reasons apparent upon the face of said amended bill.

Wherefore the defendants pray that the said amended bill may be dismissed and that they may have judgment for their costs.

HARDY I. HALEY.
ZOE HALEY.

EDWARD C. PETER,
HEMPHILL & PETER,
Solicitors for Defendants.

DISTRICT OF COLUMBIA, *ss:*

We, Hardy I. Haley and Zoe Haley, defendants in the above-entitled cause, depose and say that the foregoing demurrer is not interposed for the purposes of delay.

ZOE HALEY.
HARDY I. HALEY.

Subscribed and sworn to before me this 11th day of June, 1900.

CLIFFORD H. ROBERTSON,
One of the Justices of the Peace of the State of Maryland, in and for Montgomery County.

I, Arthur Peter, of counsel for defendants Hardy I. Haley and Zoe Haley, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

32 STATE OF MARYLAND, *Montgomery County,* } *sct:*

I hereby certify that Clifford H. Robertson, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed

his name, was, at the time of so doing, a justice of the peace of the State of Maryland in and for Montgomery county, duly appointed, commissioned and sworn, and authorized by law to take acknowledgments and administer oaths, and to exercise the jurisdiction conferred by law on such justice; and, further, that I am well acquainted with the handwriting of such justice, and that the signature attached thereto, purporting to be his, I believe to be genuine.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the circuit court for Montgomery county this 11th day of June, A. D. 1900.

(I. R. stamp.)

[SEAL.]

THOMAS H. DAWSON,
Clerk of the Circuit Court
for Montgomery County.

33 *Decree, &c.*

Filed December 23, 1901.

In the Supreme Court of the District of Columbia.

ANNA L. PECK ET AL.
vs.
HARDY I. HALEY ET AL. } No. 19946.

This case coming on to be heard upon the demurrer of the defendants to the amended bill filed herein on the 18th day of June, 1900, was argued by counsel for the respective parties in interest, and submitted to the court, and upon consideration thereof it is this 23rd day of December, 1901, ordered that said demurrer be, and is hereby, sustained, and the bill of complaint be, and is hereby, dismissed, with costs to the defendants.

JOB BARNARD, *Justice.*

From this decree the complainants appeal to the Court of Appeals, which is allowed, and the bonds for costs on such appeal is fixed at one hundred dollars.

JOB BARNARD, *Justice.*

34 *Opinion of Mr. Justice Barnard.*

Filed December 23, 1901.

In the Supreme Court of the District of Columbia.

ANNIE L. PECK ET AL.
vs.
HARDY I. HALEY ET AL. } No. 19946. Equity.

An amended bill was filed in this case January 13, 1900, in which it is alleged that the complainants are the sole heirs-at-law and legal representatives of Ann Bartlett, who departed this life intestate in

the year 1876; that said Ann Bartlett was the wife of John L. Bartlett, who survived her and who died May 24, 1884.

That November 8, 1828, William A. Bradley, as trustee, in consideration of $2,450.00, conveyed to said Ann Bartlett and her heirs parts of two tracts of ground in the District of Columbia called "Long Meadows," and "Chance," containing 46 acres. On the same date she and her said husband conveyed the said property to Roger C. Weightman and John H. Riely in trust to secure the payment of a note held by said John L. Bartlett for $1,200, made by one George W. P. Curtis, payable six months after date, and dated November 4, 1828, which note was discounted at the Bank of Washington by said Bartlett and the proceeds applied to the payment of the residue of the purchase-money for said land.

That said Curtis paid the said note and the said Weightman and Riely, as trustees, ought to have reconveyed said land to said Ann Bartlett.

35 That they did not do so, and Riely died, and thereafter, November 3, 1869, Weightman, as surviving trustee, made a deed, by way of a release of said trust, to the father of the defendants.

That July 1, 1830, said John L. Bartlett, who had a life estate therein by the courtesy, entered into a contract with Robert Isherwood to sell and convey in fee-simple said land to him for $1,550.00, and to give him possession November 1, 1830, when $1,200.00, the balance of purchase-money, was to be paid.

That the property described in the bill as lots 10, 11, 12, 13, 23, and 24, block or square 10, is a part of said land, and came to the possession of the defendants through certain conveyances and proceedings from said Robert Isherwood without any title other than the said contract of sale of said John L. Bartlett and the said improper release from said Weightman, surviving trustee.

The other material allegations of the bill are mainly to explain the apparent laches in bringing this suit, showing complainants to be widely scattered, and stating details of the previous litigation and efforts to recover said land.

The prayers of the bill are for process; to have a decree declaring that the title now held by the defendants is held by them in trust for the complainants; that defendants be enjoined from setting up in defense of an ejectment suit by the complainants the said release deed from said Weightman, or that issues be sent by this court to a law court to try the title to said lots, and that this cause be

36 retained until trial at law can be had, and that full relief be granted herein.

To this amended bill the defendants have filed a demurrer because of laches and the statute of limitations; because the remedy of complainants, if any, is at law; because complainants have no title, they having conveyed the same to persons not made parties herein, and the title still remaining in said third parties, and because the prayers for relief are inconsistent with each other.

It is the theory of the complainants, as indicated by the bill and

arguments of counsel, that John L. Bartlett only sold his life estate in said tract of ground, and that during his lifetime it was not necessary or competent for Ann Bartlett, or those claiming under her, to take any action for the protection of the estate in remainder.

I am unable to accept this as the correct theory of the case, but, on the contrary, I am impressed with the idea that John L. Bartlett undertook to sell the whole title, and Isherwood understood he was buying the whole title, as recited in said contract (Exhibit "C"); that the deferred payments of purchase-money was to be made contemporaneously with the delivery of a deed in fee and the possession of said land.

The bill avers that such possession was given, but is silent as to the payment of the balance of the purchase-money which was to have been paid at the same time, and it avers that said John L. Bartlett never complied with his undertaking to convey said land in fee-simple.

37 There is a strong presumption arising from the terms of the contract and the conduct of the parties following its execution, the delivery and retention of possession, that the purchase-money for the fee was paid and deed given. The circumstances stated in the bill indicate, to my mind, that said Isherwood claimed to own the whole title to said ground, and, if so, his possession for so many years, coupled with such claim of title, would ripen into a good title by possession, notwithstanding he had no deed.

If, however, he only claimed the life estate of John L. Bartlett and made no claim to the fee or title in remainder, then was it not the duty of the remaindermen to protect their title and interests by instituting some proceeding to set aside the deed made by Weightman as surviving trustee to Alfred H. Haley, November 3, 1869? On that day said deed was recorded in Liber T. R. No. 18, folio 400, and it was recited therein that the said debt had been paid and that "the purpose for which said trust was executed" had ceased and determined, and that said Haley was "the last and present assignee for said land of the said John L. and Ann Bartlett." The said deed of trust gave no express power to the trustees to release on payment of the note, but only gave the power to sell on default of payment.

If, as contended by counsel for complainants, the legal title still remained in said trustee, Weightman, after the expiration of the said trust, that title passed by said deed, rightfully or wrongfully, to said Haley, on November 3, 1869, and said Ann Bartlett, whose heirs now claim said property, was then living, and she con-

38 tinued to live for seven years thereafter and took no steps to have said deed set aside. It is averred, on belief, that Ann Bartlett never knew of said deed. The fact of her non-residence and want of knowledge and failure to look after her title and interests here, if any she had, strengthens the presumption that a deed was made as per the covenant of John L. Bartlett, and that Isherwood and those claiming under him did have and claim title adversely. In brief, it seems to me that the said Isherwood and those claiming

under him have held adverse possession of this property and exercised exclusive rights of absolute ownership over it, under a color and claim of title, for such a length of time as to raise an indisputable presumption of a grant from said Ann Bartlett, and for that reason, if for no other, the court ought to dismiss the bill. The deed from Weightman to Haley, if the debt was paid and the trust ended at the time the note secured came due, would be void, it is claimed, in case Haley was not the assignee of Ann Bartlett. If he was such assignee it would seem to be a useless conveyance, for if the debt was paid as alleged the trust was at an end and a release would have been conclusively presumed before the date of said deed to said Haley.

Kirk *v.* Parkhill, 1 Maca, 28.
Pelz *v.* Clark, 5 Peters, 481.

If necessary, however, to invoke the same the rule of laches should be applied in this case in the interest of *bona fide* holders and owners of real estate, which estate they have owned, improved, paid taxes on, divided among tenants in common, and transferred for
39 nearly three-quarters of a century, while the complainants or those under whom they claim stood by or made no inquiry as to their rights. Diligence in asserting claims must be the rule required in such cases for the general welfare of the community, and the want of diligence must deprive the claimant of a remedy for his supposed rights.

I have reached the conclusion, from the whole case as shown by the bill and exhibits, that this cause is one which cannot be equitably maintained, and without assigning further reasons I will sign a decree dismissing the bill, with costs.

JOB BARNARD, *Justice.*

Memorandum.

January 15, 1902.—Appeal bond filed.

40 *Instructions for Preparing Record.*

Filed February 10, 1902.

In the Supreme Court of the District of Columbia.

ANNIE L. PECK ET AL.
vs.
HARDY I. HALEY and ZOE HALEY. } Equity. No. 19946.

The clerk in preparing the transcript for the appeal in this case will include the following parts of the pleadings, viz:

Amended bill.
Exhibit C to amended bill.
Demurrer to amended bill.
Opinion of the court.

Decree dismissing amended bill, and appeal, allowance and fixing bond.

Note of filing bond.

A. A. BIRNEY,
LEO SIMMONS, AND
HUGH T. TAGGART,
For Appellants.

Also include Exhibits "A & B" to original bill.

LEO SIMMONS,
For Appellants.

41 UNITED STATES OF AMERICA, } ss:
District of Columbia, }

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 40, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 19946, equity, wherein Annie L. Peck *et al.* are complainants and Hardy I. Haley *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 18th day of February, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1185. Annie L. Peck *et al.*, appellants, *vs.* Hardy I. Haley *et al.* Court of Appeals, District of Columbia. Filed Feb. 27, 1902. Robert Willett, clerk.

ADDITION TO RECORD PER STIPULATION OF COUNSEL.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1902.

No 1185.

ANNIE L. PECK, CALDWELL E. SMITH, ANNA E. FRIAR, ET AL., APPELLANTS,

vs.

HARDY I. HALEY AND ZOE HALEY.

FILED SEPTEMBER 24, 1902.

Liber T. R. No. 18, Folio 400 *et seq.*

Filed Oct. 30, 1899. J. R. Young, Clerk.

Roger C. Weightman, Sur. Tr., to Alfred G. Haley. } Release. Recorded November 3, 1869.

This indenture made this third day of November in the year of our Lord one thousand eight hundred and sixty-nine by and between Roger C. Weightman sole surviving trustee of Washington city District of Columbia party hereto of the first part and Alfred G. Haley attorney-at-law as trustee in partition for the heirs of Robert Isherwood deceased of the same place party of the second part. Whereas John Bartlett and Anna L. Bartlett his wife by their deed of indenture duly made and executed bearing date on or about the eighth day of November in the year of our Lord eighteen hundred and twenty-eight did grant and convey to the said Roger C. Weightman and John H. Reiley and the survivor thereof and to his heirs and assigns all that piece of land in the county of Washington and District of Columbia to wit: being a part of the patented tract called Long Meadows and beginning therefor at the southwest corner of that other part of Long Meadows which on July 14, 1818 (Liber A. R. 42–416) was conveyed by John McLeod to Elias B.

Caldwell and running thence south 14° 30′ west 23½ poles; thence south 25° east 38 poles thence south 75° 28′ east 140½ poles thence north 2° 30′ west 30 poles to the beginning of the tract called "Chance" thence north 33° 30′ west 32.3 poles thence straight to the beginning containing 46 acres of land more or less together with all and singular the appurtenances ec. ec. ec. in trust to secure unto the Bank of Washington full payment of a certain note of hand for $1,200 and its renewals as endorsed by the said John L. Bartlett as by reference to said deed of indenture duly recorded in Liber W. B. No. 23 folio 408 *et seq.* of the land records for the county of Washington, District of Columbia, will more fully and at large appear. And whereas the said debt with interest and costs have been fully paid and discharged to the Bank of Washington in so far at least as the said endorser John L. Bartlett was therefor bounden as witness the signature of the now president of said bank and the official seal of said bank hereto affixed and the purposes for which said trust was executed have therefore ceased and determined and the said Alfred G. Haley as trustee in partition aforesaid is entitled in law to a reconveyance of the premises free and discharged of and from the said trusts as aforesaid and as fully as if the said deed had not been made, he the said Haley as trustee being the last and present assignee for said land of the said John L. and Ann Bartlett. Now this indenture witnesseth; that for and in consideration of the premises and of the sum of one dollar to him the said party of the first part in hand paid by the said party of the second part at and before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged the said party of the first part hath granted bargained sold conveyed released assigned and by these presents doth grant bargain sell convey release and assign all and singular the aforesaid premises with the appurtenances and every part and parcel thereof as fully and entirely as the same now are in law or equity vested and standing in the said party of the first part by or under the said in-part-recited deed unto him the said party of the second part his heirs and assigns forever. To have and to hold the same and every part and parcel thereof with the appurtenances unto the said party of the second part his heirs and assigns forever to his and their only proper use benefit and behoof forever free clear and discharged of and from all and every right title interest and trust now existing in said party of the first part by or under the said conveyance aforesaid. In trust however for the benefit of the heirs of Robert Isherwood deceased as per his title as trustee aforesaid.

In witness whereof the said party of the first part hath hereunto set his hand and affixed his seal the day and year first above written.

R. C. WEIGHTMAN, [SEAL.]
Surviving Trustee.
N. GUNTON, *Pres't.* [SEAL.]

Signed sealed and delivered in presence of—
THOMAS C. CONNOLLY.
L. FREUND.

DISTRICT OF *Washington*, } *To wit:*
County of Washington, }

I, Thomas Connolly a justice of the peace in and for the District and county aforesaid do hereby certify that Roger C. Weightman a party to a certain deed bearing date on the third day of November in the year of our Lord one thousand eight hundred and sixty-nine and hereto annexed personally appeared before me in the county aforesaid the said Roger C. Weightman being personally well known to me as the person who executed the said deed and acknowledged the same to be his act and deed.

Given under my hand and private seal this third day of November, A. D. 1869.

THOMAS CONNOLLY, *J. P.* [SEAL.]

DISTRICT OF COLUMBIA:

OFFICE OF THE RECORDER OF DEEDS, *October* 27, 1899.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber T. R. No. 18 fol. 400 *et seq.* one of the land records of the District of Columbia.

GEO. F. SCHAYER,
Dep. Recorder of Deeds.

[SEAL.]

[I. R. stamp.]

In the Court of Appeals of the D. C.

ANNIE L. PECK ET AL.
v.
HARDY I. HALEY ET AL. } No. 1185.

It is agreed between counsel for the parties that this paper-writing, which was filed by the appellant in the court below as an exhibit to their bill of complaint, may be printed as a part of the record in this case.

ARTHUR PETER,
Att'y for Appellees.
LEO SIMMONS,
A. A. BIRNEY, AND
HUGH T. TAGGART,
For Appellants.

[Endorsed:] Annie L. Peck *et al.*, appellants, *vs.* Hardy I. Haley *et al.* 1185. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Sep. 24, 1902. Robert Willett, clerk.

IN THE

Court of Appeals of the District of Columbia.

ANNIE L. PECK, *et al*, *Appellants*,
vs.
HARDY I. HALEY, *et al*. } No. 1185.

Brief for Appellants.

H. T. TAGGART,
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For Appellant.

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STATEMENT OF THE CASE.

This case comes before the Court upon appeal from an order sustaining a demurrer to and dismissing an amended bill of complaint.

The bill, after stating the citizenship and residence of the parties in different places in the United States, avers in substance:

That in the year 1876, a certain Ann Bartlett died at Owego, in the State of New York; that she was the daughter of James M. Lingan of the District of Columbia; that after the death of Elias B. Caldwell, her first husband, she married John L. Bartlett; that she had issue by both marriages, and that the complainants, a child and the grandchildren of the said Ann, comprise her sole heirs-at-law. (Par. 3, Rec. pp. 2, 3.)

That the said Ann Bartlett bought at public auction, from a certain William A. Bradley, trustee, a parcel of land in said District, being parts of the tracts called Long Meadows and Chance, at the price of $2,450, and that she secured the payment of the purchase money to the satisfaction of said trustee, who conveyed the land to her in fee by deed dated November 8, 1828, and recorded on the same day. (Par. 4, Rec. pp. 3, 4.) A certified copy of the deed, marked Exhibit A,

is filed with the bill and made part thereof. (Rec. pp. 11, 12.)

That on November 4, 1828, George W. P. Custis made and delivered to the said John L. Bartlett, the promissory note of him, said Custis, for the sum of $1,200, payable to the order of the said John L. Bartlett in six months; that said note was endorsed by said John L. Bartlett and was discounted at the Bank of Washington and the proceeds applied to the payment of the residue of said purchase money; and that by deed dated said November 8, 1828, the said Ann Bartlett and her husband, the said John L. Bartlett, conveyed the said parcel of land to Roger C. Weightman and John A. Riely, and the survivor of them, his heirs and assigns in trust to secure the payment of the said note, and with power to sell in case of default by said Custis in such payment; and after payment out of the proceeds of sale, of the costs and expenses of the sale and of the note, to pay over the surplus, if any, to the said Ann Bartlett her executors, administrators and assigns. (Par. 5, 6, Rec. p. 4.) A certified copy of this deed of trust, marked Exhibit B, is filed with the bill and made part thereof. (Rec. pp. 13, 14.)

That by the application of such proceeds of said note to the payment of the said purchase money, the whole of it ($2,450) was paid and discharged; that the debt to the said Bank on such discount was satisfied and discharged by the said Custis, and that thereupon and thereafter it became, and was the duty of the said trustees and of the survivor of them to reconvey the said parcel of land to the said Ann Bartlett, notwithstanding the trust deed did not in terms provide for such reconveyance. (Par. 6, Rec. pp. 4, 5.)

That such reconveyance was not made to the said Ann Bartlett in her lifetime, nor has it been made to her heirs since her death, but that the said Weightman who survived the said Riely, improvidently and in violation of his duty in the premises, as such trustee, did execute and deliver to the father of the defendants, a deed of conveyance by way of a

release of the said deed of trust, and did thereby transfer to and invest with the legal title to said parcel of land, one not holding in privity of estate with the said Ann Bartlett, to the great detriment of her and her heirs. (Par. 6, Rec. p. 5.)

That prior to July 1, 1830, issue had been born alive of the marriage of said Ann and John L. Bartlett, whereby the latter became seized of an estate by the curtesy in the said parcel of land; that on said July 1, 1830, said John L. Bartlett and a certain Robert Isherwood entered into a contract, whereby the said Bartlett, in consideration of $350 then paid, and of other $1,200 to be thereafter paid to him, said Bartlett, by said Isherwood, agreed to convey on or before November 1, 1830, the said parcel of land in fee to said Isherwood by a good and sufficient deed, and further agreed that the said Isherwood might enter upon the same on or before said November 1, 1830, and that he, the said Isherwood and his heirs and assigns should take and receive the rents, issues and profits thereof from said July 1, 1830; that thereupon the said Bartlett delivered possession of the said land to said Isherwood and he entered upon the same, and that by said contract the said Isherwood agreed to pay said $1,200 balance of the purchase money upon the execution of such deed. (Par. 7, Rec. p. 5.)

A copy of said contract, marked Exhibit C, is filed with the bill and made part thereof. (Rec. pp. 15, 16.)

That the said Isherwood died June 1, 1849, testate and in possession of said land, leaving a widow and as his sole heirs-at-law, three children of their marriage, one of whom intermarried with Alfred G. Haley (father of defendants); and that the said three children succeeded to such rights in said land as the said Isherwood had at the time of his death, and succeeded him in the possession of it. (Par. 8, Rec. pp. 5, 6.)

That said will is dated December 15, 1847, and was probated in the Orphans' Court on June 19, 1849; that by it

the testator devised in general terms and not by particular description thereof, all his estate to his wife, with remainder to his said three children equally, share and share alike. (Par. 8, Rec. p. 6.)

That said John L. Bartlett survived the said Isherwood for thirty-five years and died on May 24, 1884, never having complied with his undertaking to convey the said land to said Isherwood by a good and sufficient deed; and that the only estate in said land acquired and held by said Isherwood during his lifetime was the right to the possession and to the rents and issues and profits thereof during the lifetime of him, said John L. Bartlett, and the said heirs-at-law and devisees of said Isherwood have not acquired any other or greater estate therein. (Par. 8, Rec. p. 6.)

That by deed dated April 11, 1866, the widow of said Isherwood relinquished to her said three children her interest in his real estate; and that they by deed dated May 24 1866, conveyed all their interest in his real estate to J. H. McCutcheon, in trust for certain purposes as to the part thereof in Washington City, and in trust to convey the residue to said Alfred G. Haley in trust for the creation of a fund for the benefit of said grantors; that by deed dated June 5, 1866, said McCutcheon did so convey to the said Haley; that by deed dated June 1, 1870, the said Haley conveyed said residue to Moses Kelly, who, by deed dated April 26, 1875, conveyed it to Clark and others, by whom a subdivision was made and recorded of the land so conveyed to Ann Bartlett and mentioned in said contract between said John L. Bartlett and said Robert Isherwood; and that said Clark and others conveyed lots 10 to 25, both inclusive, in block 10 of said subdivision, to said Alfred G. Haley; and that this deed and the preceding ones, although in form deeds in fee simple did not and could not operate to invest the grantees with any other or greater estate in the property conveyed

than an estate for the life of said John L. Bartlett. (Par. 9, Rec. pp. 9, 10.)

That said Haley was a lawyer by profession, and on June 5, 1866, the date of the deed to him from McCutcheon, knew the condition of the title to the land, that the debt secured by the deed of trust to Weightman and Riely had been so discharged as aforesaid long before, and that no reconveyance of the title had been made by them to said Ann Bartlett; and that said Haley also knew that said Ann and John L. Bartlett had removed to Connecticut prior to 1840 and were not residents of the District, and that said Haley also knew that said John L. Bartlett could not recover said land, and believing that the long possession of said Isherwood and the long absence of said Ann Bartlett from the District made it improbable that she or her heirs would ever appear to claim it, and that the position of said Isherwood's heirs and devisees would be strengthened thereby, did craftily and in derogation of the rights of the said Ann Bartlett, induce and procure the said Weightman, as surviving trustee, to execute and deliver a deed of conveyance to him, said Haley, bearing date November 3, 1869, and which was recorded on the same day, whereby the legal title in fee to said land became vested in him, said Haley; and that it is now vested by descent in his two children, the defendants, who are his sole heirs-at-law. (Par. 10, Rec. pp. 7, 8.)

A certified copy of said deed, marked Exhibit D, is filed with the bill and made part thereof. (Supplement to the Record.)

That said Haley died in the year 1882 intestate and that the said John L. Bartlett survived him for two years and died at Hammerton, New Jersey, on May 24, 1884; that defendants, upon the death of their father, entered into possession of the certain subdivision lots aforesaid and still hold possession of the same and wrongfully refuse to deliver such possession to complainants, notwithstanding the only estate which they lawfully held in the same was terminated by the

death of said John L. Bartlett and a right of re-entry thereon accrued to complainants by such death. (Par. 11, Rec. p. 8.)

That after such removal of the said John L. and Ann Bartlett from said District, they remained in Connecticut until the year 1860, and then moved to Owego, in the State of New York; that between the dates of his removal from the District and the death of his wife in 1876, he was absent from home for long periods of time, and visited the same infrequently; that after the death of his wife in 1876, he traveled from place to place and his whereabouts were unknown to the children of the said Ann Bartlett, that by reason of marriages, half-blood relationship, deaths of parents, and other causes the descendants of the said Ann had become widely scattered, and were living at various places remote from each other, and the whereabouts of but few of them known to the others; that Annie L. Peck became aware of the death of her father about one week after it had taken place, but the remaining descendants of said Ann did not learn of it for several years thereafter, and those residing in Texas not until the year 1891, and that since learning of their rights in the premises complainants have been diligent through counsel learned in the law, and agents and trustees, to enforce the same. (Par. 12, Rec. pp. 8, 9.)

That at the instance of the said Annie L. Peck, her husband was, prior to 1891, endeavoring to ascertain the whereabouts of the other descendants of the said Ann, with a view to united action on their part to recover said land, and that it was not until 1891 such action became possible; that by the advice of counsel certain deeds of conveyance were executed by complainants to Ezra J. Peck and Leo Simmons, in trust, to institute and prosecute such suits and actions as might be necessary to recover said land, and to sell and dispose of the same for the benefit of said descendants. (Par. 12, Rec. p. 9.)

That one of said deeds is dated October 20, 1891, and

the other June 20, 1892; that the said Peck and Simmons, trustees, in the month of October, 1892, instituted a suit in ejectment in the Supreme Court of the District to recover said subdivision lots 10, 11, 12, 13, 23 and 24, and instituted another suit in ejectment against Christian Heurich, who held under said Haley, for the recovery of other portions of said land; that upon the trial of the last mentioned case the Court held the said last mentioned deeds to be invalid and void, which ruling was affirmed by this court in 6 Appeals, D. C., 273, and by the Supreme Court of the United States in 167 U. S., 264. (Par. 12, Rec. p. 9.)

That until informed by their counsel of the fact none of the descendants of said Ann Bartlett had knowledge of the said deed from Weightman, trustee, to said Haley; that complainants were advised by counsel, who gave it as their opinion, based upon the decisions of the Supreme Court in Doe *vs.* Considine, 6 Wall., and Young *vs.* Bradley, 101 U. S., that by the payment of the debt secured, the title of the said Weightman and Riely, trustees, became extinct and the legal title to said land revested in said Ann Bartlett, and that the said deed from Weightman, surviving trustee, would be no bar to the maintenance of ejectment by the complainants. (Par. 13, Rec. pp. 9, 10.)

That complainants are now advised by said counsel, upon further consideration and upon consultation with other counsel recently employed by complainants, that they are of opinion that said deed of trust to Weightman and Riely falls within the class of instruments considered in Lincoln *vs.* French, 105 U. S., and not to the class to which those belonged which were considered in the two first mentioned cases; and that under the decision in Lincoln *vs.* French the legal title to said land continued in said trustees and in the survivor of them until it passed to said Haley by the deed from said Weightman;

that it was in said Haley at the time of his death, and upon his death passed to the defendants. (Par. 13, Rec. p. 10.)

That for as much as complainants can not bring their action of ejectment for the said enumerated subdivision lots because the naked legal title thereto is thus outstanding, and have no other remedy in the premises they pray:

That defendants be required to answer and to that end that process issue against them.

That a decree be passed as to the title acquired by said Haley, under the deed to him from said Weightman, and which passed to the defendants upon said Haley's death, declaring that the same be held by said defendants in trust for complainants.

That complainants be permitted by said decree to bring and prosecute their action of ejectment for the recovery of said lots and that defendants be enjoined and restrained by said decree from setting up in their defence in such action the said deed from said Weightman to said Haley; or that issues to try the question of title to said lots may be framed and sent by the court to the law court under the same restrictions.

That the amended bill of complaint be retained by the Court until such action of ejectment or such issues be tried and determined, and if the complainants prevail therein that the Court by its other and further decree require the defendants to convey and release the said title to complainants.

For general relief. (Rec. pp. 10, 11.)

The grounds of demurrer assigned are:

1. Laches.
2. The statute of limitations.
3. That complainants' remedy, if any, is at law and not in equity.

4. That any title which complainants may have had in the property has been conveyed by them to others who are not made parties to the suit.

5. Because complainants' prayers are inconsistent with each other.

6. For other reasons apparent on the face of the amended bill.

Upon the hearing the court passed an order sustaining the demurrer and dismissing the amended bill. (Rec. p. 18.)

Assignment of Errors.

1. The court below erred in sustaining said demurrer and dismissing said amended bill.

2. The court below erred in not overruling said demurrer, and in not requiring the defendants to make answer to said bill.

Argument.

For the purposes of this appeal the facts averred in the amended bill are to be accepted as true.

McGee *vs.* Welch, 18 App. D. C., 177.

Pac. R. R. Co. *vs.* Pac. R. R. Co., 111 U. S., 520.

It is obvious on the face of the bill that, of the specific grounds of demurrer assigned, the 4th and 5th are without foundation. There remain to be considered the grounds of the statute of limitations, remedy at law, and laches.

The Statute no Bar.

At the time of the execution of the contract between John L. Bartlett and Robert Isherwood in 1830, the said Bartlett was seized of an estate by the curtesy in the land. The contract and the delivery of possession of the

land operated to transfer said Bartlett's life estate to Isherwood, leaving only an estate in remainder to the said Ann Bartlett and her heirs; complainants had no right of entry until the death of the life tenant.

Gregg *vs.* Tesson, 1 Black, 150.
Central Land Co. *vs.* Laidly, 3 L. R. A., 830.
Sherball *vs.* Hurdley, 31 Ill., 228.
Townsend *vs.* Townsend, 25 So. Repr., 716.
Jacob *vs.* Rice, 33 Ill., 372.

Ann Bartlett died in 1876 in the lifetime of her husband; the latter died in 1884; there can be no bar in any event under the statute until 1904, and this suit was instituted in 1898.

Complainants Have no Remedy at Law.

The bill avers that no release or reconveyance to Ann Bartlett or her heirs was ever executed by Weightman and Riely or the survivor of them, and it avers that the legal title passed to Haley by the deed from Weightman to said Haley, and by the death of said Haley intestate passed to his heirs-at-law, who are the two defendants. This is admitted by the demurrer and there can be no presumption otherwise.

The case is not one of an outstanding unreleased mortgage, by the terms of which the mortgagor is to remain in possession until default; but if the case were one for the indulgence of a presumption of a reconveyance to Ann Bartlett or her heirs the presumption would be a rebuttable one, and in case of ejectment by the complainants against the defendants the deed from Weightman to Haley could be set up in defence, the presumption rebutted and this would defeat the action.

Lincoln *vs.* French, 105 U. S., 614.
Wilkes *vs.* Wilkes, 18 D. C. App., 97.
Hollingsworth *vs.* Sherman, 81 Va., 672.

The common law rule is that plaintiff cannot maintain ejectment "Upon an equitable title, however clear and indisputable it may be, but must seek his relief in chancery."

Tyler on Eject., 75.

> "It is well settled that an action of ejectment cannot be maintained in the courts of the United States on the mere equitable title."
>
> Carter *vs.* Ruddy, 166 U. S., 496, citing—
> Johnson *vs.* Christain, 128 U. S., 382, among other cases.

Under the code of the District of Columbia (Sec. 989) the defendants, being in possession under the surviving trustee, might, apparently, set up as a defence in such suit that the legal title was not in the plaintiff, and was, in fact, in themselves by descent, under the deed to their father.

The debt having been paid by Custis, whose obligation it was, it is evident that a resulting trust arose for the benefit of Ann Bartlett, and that it was the duty of the trustee thereupon to reconvey to her if alive, and if dead to her heirs, and not to a stranger; he held for her and their benefit only.

Under the release to Haley he took *cum onere*, for it is averred that he craftily and in derogation of her rights procured its execution, with intent to use it as an obstruction to the assertion of her rights and the rights of complainants under her. He knew that its execution would be a breach of trust on the part of the trustee and a fraud upon both the trustee and the complainants. Haley then became a trustee, *ex maleficio*, and was in conscience bound to reconvey; that duty has devolved and now rests upon his heirs-at-law, the defendants, and they should not be permitted to profit by their refusal to recognize and perform it.

The following authorities fully support this contention:

"The holder of a legal title in bad faith must always yield to a superior equity."

Widdicombe *vs.* Childers, 124 U. S., 403.

"Whenever the purchaser of trust property is affected with notice of the fact, which in law constituted the breach of trust, the sale is void as to him."

Wormley *vs.* Wormley, 8 Wheat., 421.

"Where one has acquired the legal title to property to which another has the better right, equity will convert him into a trustee for the true owner and compel him to convey the legal title."

Meador *vs.* Norton, 11 Wall., 458.

"The law exacts the most perfect good faith from all parties dealing with the trustee, respecting trust property, and whoever takes it for an object other than the purposes of the trust, or such as may reasonably be supposed to be within its scope, must look to the authority of the trustee or he will act at his peril."

Smith *vs.* Ayers, 101 U. S., 320.

"One who by fraudulent misrepresentations obtains a conveyance from the owner of any interest in property real or personal, is, in equity, a trustee *ex maleficio* for the person defrauded; and any one taking the property from such trustee with notice of the fraud and of the consequent trust is affected by the trust."

Jones *vs.* VanDoren, 130 U. S., 691.
Moore *vs.* Crawford, 130 U. S., 128.

"It is not alleged or admitted that the defendant is a purchaser for value and without notice of the plaintiff's rights; and upon demurrer to such complaint the court can not consider the equities which the defendant may have to the land in question, as a

purchaser without notice to defeat the plaintiff's claim. These equities, if it has any, must be shown to the court by answer stated clearly and fully, so that if they be proved on the trial they will defeat the plaintiff's claim. The plaintiffs in their complaint have shown an equitable title which antedates the legal title held by the defendant, and must prevail unless the defendant can show an equitable claim to the lands equally as good or better than the plaintiff's."

Meeks *et al vs.* Milwaukee, &c., R. R. Co., 78 Wis., 525.

Complainants not Chargeable with Laches.

It has been shown that complainants are not barred by the statute of limitations, and that they might now bring ejectment were it not for the fact that the legal title is in the defendants.

The defendants refuse to convey to the complainants and to deliver the possession wrongfully withheld. Their position in the present status of the case is unconscionable; it amounts in effect to this—that although they have only a naked legal title with equitable ownership in complainants, to whom they should convey, nevertheless they should not be enjoined from setting up such title against the true owners, on ejectment by the latter, because they say such true owners have unduly delayed bringing their suit to have the wrong righted of which they complain.

The case, therefore, narrows itself down to the single question, whether or not persons out of possession should be denied the right to bring an action of ejectment because an interloper, who is a total stranger to the title, has knowingly and without consideration, and in fraud of their rights, procured a conveyance of that title from one who held it in trust for such persons.

The doctrine of laches, and in equity, even the statute of limitations, can have no application to such a case; but out of abundant caution a sufficient showing of diligence is affirmatively made in the bill (Par. 12, 13, Rec. p. 8, 9), from which it appears, among other things bearing upon this feature, that to some of the complainants the death of John L. Bartlett did not become known until 1891; that acting under the advice of counsel, deeds were prepared, and suits brought in 1891, which were not finally adjudicated in the Supreme Court of the United States until 1897. Laches could run, if at all, only from the latter year, and this suit was brought in 1898.

Pac. R. R. *vs.* Mo. Pac. R. R. Co., 111 U. S., 520.

Mr. Justice Brown, in delivering the opinion of the Supreme Court in McIntyre *vs.* Prior, 173 U. S., 54, in treating of the question of laches, refers to a class of cases, in which the Court had held that great diligence would be required in the assertion of rights, and then says:

> "Granting all that may be fairly claimed of these cases, there is another class having a different bearing, in which it has been held that in case of actual fraud a delay even greater than that permitted by the statute of limitations is not fatal to the plaintiffs' claims."

He cites several cases of the latter class, among them:

Michoud *vs.* Girod, 4 How., 503.
Prevost *vs.* Gratz, 6 Wheat., 481.
Townsend *vs.* Vanderwerker, 160 U. S., 186.
Baker *vs.* Whiting, 3 Sumn., 475.

And then says:

> "We don't wish to be understood as holding that the plaintiff, even in a case of actual fraud, may wait an indefinite time, or always so long as the statute of

limitations would permit him to bring an action at law before asserting his rights; but where the fraud is clearly proved the Court will look with much more indulgence upon any disability under which the plaintiff may labor as excusing his delay."

The following quotations from the cases mentioned appear in the opinion.

Michoud *vs.* Girod:

"In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief . . . . There is no rule in equity which excludes the consideration of circumstances, and in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

Prevost *vs.* Gratz:

"It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practiced is rather an aggravation of the offence and calls more loudly upon a court of equity to grant ample and decisive relief."

Townsend *vs.* Vanderwerker:

"The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances

of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

Baker *vs.* Whiting:

"Then it is said the plaintiffs are barred from any right in equity by the mere lapse of time. . . . . But what is more particularly applicable to the present case, twenty years had not elapsed before the filing of the bill; and I apprehend that in a case of a trust of land, nothing short of the statute period which would bar a legal estate or a right of entry is a bar of the equitable estate."

This court, in the case of McGee *vs.* Welch (18 App. D. C., 177) where the bill was filed to set aside a conveyance after the lapse of fifty-eight years, said:

"Now, while it is true the defence of laches may be availed of on demurrer, where it is plain on the face of the bill of complaint that there has been undue delay on the part of the complainants to assert their rights, and no sufficient reason is set forth to excuse such delay, yet it is well settled law that this defence will not be sustained upon a demurrer, when the bill distinctly charges fraud, and it appears that the complainants have instituted their proceedings within a reasonable time after their discovery of the fraud."

It is apparent from the opinion delivered by the learned judge below that assumptions of fact, the existence of which was expressly negatived by the bill, were potential in inducing the conclusions reached by him.

Ann Bartlett was the victim of her circumstances, but the same law which placed disabilities upon her, as a married woman, in regard to the control and protection of her real estate during her husband's lifetime, also provided that her husband should not have the power to

dispose absolutely of that real estate without her consent, and also provided how such consent should be manifested.

She died in the lifetime of her husband and the record discloses no act of hers warranting the presumption that she, at any time, parted with the title which she was powerless to protect; on the contrary, it is in terms averred that she did not part with it, and that it was never acquired by Isherwood, either legally or equitably, in his lifetime. He died in 1849, nineteen years after the execution of the contract; and if he in fact had equitably acquired her title in the meantime, why did he not assert his rights to a decree by a suit in a court of equity, knowing as he did that the record disclosed no title in him other than one *per autre vie*, and why should not the fact, if fact it be, be now set up by way of answer to the bill?

Haley, Isherwood's son-in-law, was a lawyer, and at the time of the conveyance to him by McCutchen in 1866 knew the predicament of the title to the land, and that the records disclosed only an estate for the life of John L. Bartlett in said Isherwood, and if Ann Bartlett's remainder had, by any transaction outside of the record, become equitably vested in said Isherwood, why did he not avail himself of the remedy in equity, which he knew to be the appropriate and efficient one under such circumstances?

Sixteen years elapsed from 1866 to the date of Haley's death in 1882, and can there be any doubt that during this time he would have resorted to that remedy if the facts had entitled him to it?

He did not avail himself of it, but did, as the bill avers procure a deed of release by which he was invested with the legal title, and which deed he knew at the time he obtained it to be a breach of trust on the part of the trustee, and did so procure it with the intent of using it

to obstruct any effort of Ann Bartlett or her heirs to enforce their rights.

We respectfully submit that the case presented is not one which can *properly* be disposed of on demurrer; that the errors are well assigned; that the order of the court below should be reversed, and the defendants required to answer the bill.

Respectfully submitted,

H. T. TAGGART,
A. A. BIRNEY,
LEO SIMMONS,
For Appellant.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 1185.

ANNIE L. PECK ET AL., APPELLANT,

vs.

HARDY I. HALEY ET AL., APPELLEES.

BRIEF FOR APPELLEE.

EDWARD C. PETER,
ARTHUR PETER,
Solicitors for Appellees.

LAW REPORTER COMPANY, PRINTERS, WASHINGTON, D. C.

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BRIEF FOR APPELLEE.

The demurrer of the defendants to the amended bill of complaint was sustained by the court below, from which this appeal was taken.

It appears from said amended bill that some time prior to Nov. 8, 1828 (probably a few days before said date), a tract of land containing forty-six acres lying on what is now the outskirts of the city of Washington was sold at a trustees' sale for $2,450 and on said last mentioned day the trustees conveyed the same to a certain Ann Bartlett, though it is probable that her husband, John L. Bartlett, was the real purchaser, as we find that $1,200 of the purchase money was borrowed from the Bank of Washington upon his note dated November 4, 1828, with an accomodation maker, one Custis, which said note was secured on said property by a deed of trust from John L. and Ann Bartlett to Weightman and Riley dated the same day as the deed to said Ann Bartlett (Rec. p. 13).

On July 1, 1830, John L. Bartlett sold said land to a certain Robert Isherwood and agreed to give him a deed therefor to him and his heirs, viz, *in fee simple*, on or before November 1, 1830. Isherwood, according to the bill, took possession in said year 1830 under said agreement and

though the bill alleges that he never received a *good or sufficient deed* from Bartlett, it is careful not to say that Isherwood never received any deed for said property.

By deed dated November 3, 1869, and duly recorded Weightman, surviving trustee under said deed of trust, released the same to one Haley, the father of these defendants, in whom the Isherwood title then was. *Said release recites that said note secured by said deed of trust has been paid and that John L. and* ANN BARTLETT *have assigned said lands, and that Haley is entitled to a reconveyance of the same discharged from said deed of trust.*

The defendants are descendants of said Robert Isherwood, and they or their ancestor have been in possession of the land in controversy continuously since 1830, paying the taxes thereon, subdividing and selling off nearly all of the original tract and otherwise occupying the same as owners.

Ann Bartlett died intestate in 1876. She left surviving her John L. Bartlett, her husband, and certain children and grandchildren, who, so far as the record discloses, were under no disability at the time of her death.

John L. Bartlett died May 24, 1884. Over fourteen years afterwards this bill was filed by children, grandchildren and great-grandchildren of said Ann Bartlett, seeking to set aside the release of the said deed of trust from Weightman to Haley on the ground that it constitutes an impediment to an action of ejectment.

ARGUMENT.

POINT I.

An unreleased mortgage, *which has been satisfied*, is no bar to an action of ejectment by the mortgagor against the mortgagee or third parties.

Peltz *vs.* Clarke, 5 Peters, 483.

This was a settled rule in Maryland, even before the cession of the District of Columbia, and should therefore be adopted here.

Morgan *vs.* Davis, 2 H. & McH. 17.
Beall *vs.* Harwood, 2 H. &. J. 149.
Paxon's Lesse *vs.* Paul, 3 H. & McH. 400.
Berry *vs.* Dewart, 55 Md. 73.
Brown *vs.* Stewart, 56 Md. 421.
Richardson *vs.* Railroad, 89 Md. 129.
Dentzel *vs.* Railroad, 90 Md. 446.
Evans *vs.* Bullman, 91 Md. 89.

The same doctrine has been held in most of the States and has been applied to cases where the satisfied instrument was a deed of trust, whether the same was set up by the mortgagee, his privies or a stranger.

As illustrating this see the following cases, in all of which Peltz *vs.* Clarke, 5 Peters, 483, is relied upon as authority therefor.

Carter *vs.* Taylor, 3 Head, 34.
Robinson *vs.* Leavitt, 7 N. H. 93.
Vallé *vs.* Fleming, 29 Mo. 157.
Porter *vs.* Seeley, 13 Conn. 574.
29 Wis. 190.

This rule has been adopted both in jurisdictions where the mortgage is looked upon as a mere lien and where it is held to pass the legal title to the mortgagee.

A. & E. E. of L. (2d Ed.), Vol. 20, p. 981.

Such seems to have been the conclusion reached by the courts of the District of Columbia.

Kirk *vs.* Parkhill, 1 MacA. 29.

The case of Wilkes *vs.* Wilkes, 18 D. C. 96, in no wise conflicts with this principle; for there it was not contended

that the deed of trust had been *satisfied.* Moreover, the court says:

> "Undoubtedly, as between mortgagor and mortgagee and their privies, in the District of Columbia, the effect of either the regular mortgage or the deed of trust as a substitute therefor, has always been considered to vest the legal title in the mortgagee or trustee, subject to defeasance *only by the satisfaction of the secured debt.*"

In the case of Lincoln *vs.* French, 105 U. S. 617, the deed in trust was not in the nature of a mortgage and the principle of the satisfaction of the debt working a release thereof was obviously inapplicable.

A deed of trust, such as is in use in the District of Columbia, does not differ from a mortgage in a respect that will prevent the application thereto of the principle for which is here contended. This court has treated a deed of trust to secure an indebtedness and a mortgage as practically the same.

Middleton *vs.* Parke, 3 App. D. C. 164.
Wilkes *vs.* Wilkes, 18 App. D. C. 96.
Smith *vs.* Sullivan, App. D. C., ; Wash L. R., Vol. 31, p. 2.

A deed of trust to secure an indebtedness is in legal effect merely a mortgage.

Pingrey on Mortgages, Vol. 1, p. 186.
Jones on Mortgages, Secs. 62 and 1769.
Shillaber *vs.* Robinson, 97 U. S. 76.

POINT II.

The grant to Weightman and Riley, trustees, constituted nothing more than a dry, passive trust that was executed on behalf of Ann Bartlett.

There being nothing to show that the note secured thereby was not paid by some one at its maturity, the trust

never became active, and the legal title remains in the descendants of Ann Bartlett.

Smith *vs.* Sullivan, Apps. D. C. ; Wash. L. R., Vol. 31, p. 2.

POINT III.

The trust was only intended to give a power of sale after default, and the trustee took no greater estate. Any attempt by him to convey the property after an extinguishment of the debt was simply void.

POINT IV.

The laches of the complainants and those under whom they claim is so palpable and the reasons for the application of the doctrine so particularly cogent that relief should not be granted.

Prior to November, 1830, Isherwood took possession of the land in question under a contract by which he was to have the fee simple title. On November 3, 1869, it is alleged that Weightman wrongfully released the deed of trust to the privy of the defendants.

By an act of Congress passed April 10, 1869, the interest of Ann Bartlett in the land in question became her statutory separate estate, even if it be conceded, as it is not, that by the terms of the deed to her, which provides that the land was to be held to and for her (Ann Bartlett), only proper use and behoof (Rec. p. 12) it did not become her equitable separate estate.

The act of Congress above cited gave her the right to sue for said property as if she were unmarried, and yet she died seven years after the recorded conveyance from Weightman, and forty-six years after the transfer by her husband, having taken no steps to assert her rights.

The complainants or their ancestors then waited an additional period of twenty-two years, during which all the

parties to the transaction passed away, before this suit was filed. In the meantime the land has been subdivided and sold, leaving an infinitesimal part in the descendants of Isherwood. To set aside the deed in question would be to cloud the title of many innocent purchasers who are not parties to this suit.

Let us see what excuses the complainants give for their failure to proceed diligently.

For Ann Bartlett's failure to proceed for seven years, the only excuse is her alleged absence from the District.

To excuse the complainants, it is said that until about fourteen years before this suit was instituted the defendants were entitled to hold the property as the grantees of the curtesy of John L. Bartlett.

But the mere fact that one is not entitled to the immediate possession of property in no wise prevents him from filing a bill in equity to set aside a deed which it is alleged his trustee has made, in breach of his trust. Such a suit could be maintained at once, and from the waiting of twenty-nine years before it is instituted, it is fair to assume that the trustee acted properly in releasing the deed of trust to parties who had paid the same and were entitled to have the release.

There is absolutely nothing in the bill to indicate that upon the death of Ann Bartlett her rights descended to infants or married women, so that can not be relied upon.

It is said that the complainants were not living in the same place; if this be an excuse why a joint action was not brought, why did they not proceed singly?

They say they did not know when their father died. How is that important, since they might have proceeded before his death.

The attempt to relieve themselves of their laches by the mere indefinite statement that Haley procured the release by fraud will not stand.

What was the nature of the fraud?

Did Robert Isherwood pay off the indebtedness secured by the deed of trust in question?

Upon this the bill is silent.

If he did, was not Haley right in procuring the release?

The bill is careful not to allege that the mortgage was paid off by the mortgagor or her privies nor is it alleged that those under whom the defendants claim paid the same. If the first be true, then under the authority of Peltz *vs.* Clarke the complainants have full remedy at law, and if the second be the fact then the defendants, under the same decision, are entitled to hold the release as security until they are repaid.

It is said that they entered into a champertous attempt to obtain the land sixteen years after they were entitled to have the release set aside, and that the court disapproved of such.

It is said that their counsel first believed the law to be as defendants now contend, but that after six years additional consideration, they have reached a different conclusion.

These are their excuses for waiting twenty-nine years, until the facts are buried with the dead.

If they, or those under whom they claim paid off the deed of trust, they have a sufficient remedy at law; if they have not paid it off then they must offer to do so before the release to the defendants will be canceled.

The complainants are not in possession and therefore can not maintain a suit to remove a cloud from the title.

We respectfully submit the decree should be affirmed.

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